STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	
Petition for approval of delivery services tariffs and tariff revisions and of residential delivery services implementation plan, and for approval of certain other amendments and additions to its rates, terms, and conditions.	:	No. 01-0423

COMMONWEALTH EDISON COMPANY'S RESPONSE
TO THE "JOINT MOTION TO STRIKE"

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COMMONWEALTH EDISON COMPANY'S
RESPONSE TO THE "JOINT MOTION TO STRIKE"

Commonwealth Edison Company ("ComEd"), by its counsel, hereby submits this response to the "Joint Motion to Strike" filed by AES New Energy, Inc., Blackhawk Energy Services, L.L.C., Dominion Retail, Inc., Enron Energy Services, Inc., the Building Owners and Managers Association, and the National Energy Marketers Association (collectively the "Movants").

The "Motion to Strike" actually is two separate sub-motions, only the first of which actually is a motion to strike:

- a sub-motion arguing that at this time ComEd legally is not authorized to and may not request, and the Illinois Commerce Commission (the "Commission") legally is not authorized to and may not order, any increases in ComEd's non-residential delivery services charges, and that at this time ComEd also legally is not authorized to and may not request revisions to the methodology for calculating unbundled metering service charges; and

- a sub-motion arguing that the Commission must immediately place into effect ComEd's proposed Rider HVDS - High Voltage Delivery Service.

The "Motion to Strike", as to each of the two sub-motions, is misleading and wrong.

· Under Sections 9-201 and 16-108 of the Public Utilities Act (the "Act"), 220 ILCS 5/9-201, 16-108, ComEd has the right to request, and the Commission has the authority to order, increases in ComEd's non-residential delivery services charges and revisions to the methodology for calculating unbundled metering

service charges. That was true on June 1, 2001, when ComEd filed the Petition that initiated this proceeding and it remains true today.

- Nothing in Section 16-111 of the Act, 220 ILCS 5/16-111, bars ComEd from requesting, or the Commission from approving, the increases proposed by ComEd in various of its non-residential delivery services charges and ComEd's proposed revisions to the methodology for calculating unbundled metering service charges. The Movants' arguments to the contrary are nonsense.

- Nothing in Section 10-113 of the Act, 220 ILCS 5/10-113, bars ComEd from requesting, or the Commission from approving, the increases proposed by ComEd in various of its non-residential delivery services charges and ComEd's proposed revisions to the methodology for calculating unbundled metering service charges.

- The "Motion to Strike", as to the first sub-motion, is flatly contradicted not only by the Act but also by the positions taken by certain of the Movants in Commission Docket Nos. 99-0013, and it is irreconcilable as well with the Commission's Orders in Docket Nos. 99-0013 and 00-0494.

- Nothing in Sections 9-241, 9-250, 16-101A, and 16-112 of the Act bars the Commission from approving just and reasonable cost based delivery services rates that allow ComEd to recover costs of providing delivery services.

- Finally, nothing in Section 16-111 authorizes, much less requires, the Commission to immediately place into effect ComEd's proposed Rider HVDS without ComEd's consent.

The "Motion to Strike" is utterly without merit and should be denied.

DISCUSSION

I. Under Sections 9-201 And 16-108 Of The Act, ComEd Has The Right To Request, And The Commission Has The Authority To Order, Increases In Non-residential Delivery Services Charges and Revisions In The Methodology For Calculating Unbundled Metering Service Charges

Under Section 9-201 of the Act, 220 ILCS 5/9-201, of course, utilities may propose, among other things, new rates and modifications to existing rates. ComEd's "rates" include its entire Schedule of Rates, which includes it delivery services rates. 220 ILCS 5/3-116. There is nothing in Section 9-201 that expressly or by implication excludes delivery services rates.

Remarkably, although Section 9-201 is among the most fundamental and long-established provisions of the Act regarding the approval of new and revised rates, the "Motion to Strike" does not even cite, much less attempt to distinguish, Section 9-201.

Section 16-108(b) of the Act, 220 ILCS 5/16-108(b), also could not be clearer in supporting ComEd, and it is directed expressly to delivery services tariffs. It provides:

> The Commission shall enter an order approving, or approving as modified, the delivery services tariff no later than 30 days prior to the date on which the electric utility must commence offering such services. **The Commission may subsequently modify such tariff pursuant to this Act.**

(Emphasis added).

Incredibly, the Movants devote only one paragraph of the "Motion to Strike" to Section 16-108(b). ("Motion to Strike", page 4). In that paragraph, they offer the sole disingenuous and transparently frivolous argument that even though Section 16-111(a)(2) of the Act expressly provides in relevant part that Section 16-111(a) "shall not prohibit the Commission from: *** (2) ordering into effect tariffs for delivery services and transition charges in accordance with Section 16-104 and 16-108...", Section 16-111(a) should be read to bar the Commission from ordering into effect modified delivery services tariffs that would increase delivery services charges. ("Motion to Strike", page 4). As already is quite obvious, and is discussed further in Section II of this Discussion, below, the Movants' argument that Section 16-111(a) in whole or in part negates Section 16-108(b) is illogical and false double-talk.

On top of that, Section 16-108(a) of the Act, 220 ILCS 5/16-108(a), also expressly provides that the Commission may modify "the prices, terms, and conditions" of delivery services tariffs. Section 16-108(a) provides as follows:

> An electric utility shall file a delivery services tariff with the Commission at least 210 days prior to the date that it is required to begin offering such services pursuant to this Act. **An electric utility shall provide the components of delivery services that are subject to the jurisdiction of the Federal Energy Regulatory Commission at the same prices, terms and conditions set forth in its applicable tariff as approved or allowed into effect by that Commission. The Commission shall otherwise have the authority pursuant to Article IX to review, approve, and modify the prices, terms and conditions of those components of delivery services** not subject to the jurisdiction of the Federal Energy Regulatory Commission, including the authority to determine the extent to which such delivery services should be offered on an unbundled basis. In making any such determination the Commission shall consider, at a minimum, the effect of additional unbundling on (i) the objective of just and reasonable rates, (ii) electric utility employees, and (iii) the development of competitive markets for electric energy services in Illinois.

(Emphasis added).

The Movants assert that "nothing in Section 16-108(a) authorizes the Commission to increase a utilities' delivery services rates in a subsequent proceeding." ("Motion to Strike", page 4). The Movants offer no explanation in support of that raw assertion, and they only citation they offer is a citation to Section 16-111(a), which, as shown above, and as is discussed further in Section II of this Discussion, below, does not support the Movants' argument in the slightest. The notion that Section 16-108(a), in expressly authorizing the Commission to modify "prices", does not authorize it to increase those prices, is patent nonsense. Although the "Motion to Strike" elsewhere mentions Section 16-108(a), nowhere does it provide any intelligible, much less valid, basis for Movants' "reading" of that subsection.

In addition, the Movants' "reading" of Section 16-108 cannot be reconciled with the Commission's Orders in Docket Nos. 99-0013 and 00-0494. In each Docket, the Commission's Order indicated that its authority to conduct the proceeding and issue its Order was based in whole or in part on Section 16-108. 220 ILCS 5/16-108. The Movants' arguments would make the Order in Docket No. 99-0013 beyond the Commission's jurisdiction and illegal. In addition, the Movants' position is inconsistent with the Commission's acceptance and the procedural

history and status of Docket No. 00-0802, in which an Administrative Law Judges' Proposed Order was issued on September 20, 2001.

II. Nothing In Section 16-111 Of The Act Bars ComEd From Requesting, Or Denies The Commission The Authority To Order, Increases In Non-residential Delivery Services Charges And Revisions In The Methodology For Calculating Unbundled Metering Service Charges

The centerpiece of the "Motion to Strike" is the Movant's complete misinterpretation of Section 16-111 of the Act. Under the plain language of Section 16-111, nothing therein prohibits ComEd from seeking, or the Commission from approving, modifications to existing delivery service rates even if the changes result in an increase in delivery service rates.

The Movants begin their arguments in the Motion to Strike by advancing the false premise that, under Section 16-111: "During the transition period, the authority of electric utilities to request modifications to their tariffs is limited to discrete circumstances set forth by the General Assembly." ("Motion to Strike", page 2). That simply is not an accurate and fair characterization of Section 16-111. Section 16-111's highly detailed provisions expressly bar or limit modifications to some, not all, tariffs. Moreover, nothing in Section 16-111 states or implies that during the transition period all other statutory provisions the Act that authorize a utility to seek, and the Commission to approve, tariff modifications provisions, such as Sections 9-201 and 16-108, are nullified. Such a reading makes no sense given that, among other things, Sections 16-108 and Section 16-111 were enacted together and, as noted earlier and as discussed further below, Section 16-111 expressly confirms the authority of the Commission under Section 16-108.

Section 16-111(a), which the Motion to Strike conveniently never actually sets forth in its entirety, states as follows:

(a) During the mandatory transition period, notwithstanding any provision of Article IX of this Act, and except as provided in subsections (b), (d), (e), and (f) of this Section, **the Commission shall not** (i) **initiate, authorize or order any change by way of increase** (other than in connection with a request for rate increase which was filed after September 1, 1997 but prior to October 15, 1997, by an electric utility serving less than 12,500 customers in this state), (ii) initiate or, unless requested by the electric utility, authorize or order any change by way of decrease, restructuring or unbundling (except as provided in Section 16-109A), **in the rates of any electric utility that were in effect on October 1, 1996**, or (iii) in any order approving any application for a merger pursuant to Section 7-204 that was pending as of May 16, 1997, impose any condition requiring any filing for an increase, decrease, or change in, or other review of, an electric utility's rates or enforce any such condition of any such order**; provided, however, that this subsection shall not prohibit the Commission from**:

(1) approving the application of an electric utility to implement an alternative to rate of return regulation or a regulatory mechanism that rewards or penalizes the electric utility through adjustment of rates based on utility performance, pursuant to Section 9-244;

(2) authorizing an electric utility to eliminate its fuel adjustment clause and adjust its base rate tariffs in accordance with subsection (b), (d), or (f) of Section 9-220 of this Act, to fix its fuel adjustment factor in accordance with subsection (c) of Section 9-220 of this Act, or to eliminate its fuel adjustment clause in accordance with subsection (e) of Section 9-220 of this Act;

(3) **ordering into effect tariffs for delivery services and transition charges in accordance with Sections 16-104 and 16-108**, for real-time pricing in accordance with Section 16-107, or the options required by Section 16-110 and subsection (n) of 16-112, allowing a billing experiment in accordance with Section 16-106, or modifying delivery services tariffs in accordance with Section 16-109; or

(4) ordering or allowing into effect any tariff to recover charges pursuant to Sections 9-201.5, 9-220.1, 9-221, 9-222 (except as provided in Section 9-222.1), 16-108, and 16-114 of this Act, Section 5-5 of the Electricity Infrastructure Maintenance Fee Law, Section 6-5 of the Renewable Energy, Energy Efficiency, and Coal Resources Development Law of 1997, and Section 13 of the Energy Assistance Act of 1989.

(Emphasis added).

Under the plain language of Section 16-111(a), even without reaching Section 16-111(a)(3), Section 16-111(a) simply cannot bear the weight that the Movants attempt to place on it. Section 16-111(a)(i) expressly applies to increases in rates that were in effect on

October 1, 1996, not to all rates. The term "in the rates of any electric utility that were in effect on October 1, 1996" has to be read to apply to Section 16-111(a)(i) as well as 16-111(a)(ii), because otherwise Section 16-111(a)(i) would be incomplete and thus would make no sense at all, i.e., it would apply to an "increase" but that word would have no object on which to act or, in other words, the provision would not indicate an "increase" in what.

In addition, of course, as shown in Section I of this Discussion, above, Section 16-111(a)(3) expressly precludes any theory that Section 16-111(a) prevents the Commission from ordering modifications in delivery services rates. Section 16-111(a)(3) expressly confirms that the Commission's authority under Section 16-108 is not limited by Section 16-111(a), and, as we have seen, Section 16-108(b) and Section 16-108(a) both expressly authorize the Commission to modify delivery services tariffs.

The Movants assert that Section 16-111(a)(3) applies only to the initial approval of delivery services tariffs and not to modifications thereof that result in increased delivery services charges. ("Motion to Strike", page 4). Here, as elsewhere, the "Motion to Strike" never proceeds past the stage of raw assertion to the point of any comprehensible explanation or the citation of any relevant supporting authority. The plain language of Sections 16-111(a) and 16-108(b) and (a) shows that there is no such limitation in either Section.

In addition, Movants' reading of Section 16-111(a) runs afoul of Section 16-108(c) of the Act, 220 ILCS 5/16-108(c). Section 16-108(c) provides that: "Charges for delivery services shall be cost based and shall allow the electric utility to recover the costs of providing delivery services through its charges to delivery service customers that use the facilities and services associated with such costs." Under Movants' reading of Section 16-111(a), however, even where a utility's approved delivery services tariffs -- due to increased costs of providing delivery

services or any other factor that renders the utility's delivery services charges no longer adequate -- no longer are "cost based" and no longer "allow the electric utility to recover the costs of providing delivery services through its charges to delivery service customers that use the facilities and services associated with such costs", neither the utility nor the Commission may act to seek relief under or enforce this provision of Section 16-108(c).

The Movants' references here to Section 16-111(d) and (f), 220 ILCS 5/16-111(d) and (f), are irrelevant, given all of the foregoing. ("Motion to Strike", pages 2, 6). Whether or when a utility may seek an increase in base rates under Section 16-111(d) or a reduction in tariff prices under Section 16-111(f) has no bearing given that Section 16-111(a) does not limit modifications to delivery services tariffs in the first place. The notion that because Section 16-111(f) authorizes rate decreases it bars rate increases ("Motion to Strike", page 6 (citing *Welch v. Johnson*, 147 Ill. 2d 4, 588 N.E. 2d 1119 (1992))) is illogical and it is not supported by the case that Movants cite. That notion would mean that Section 16-111(f) would in part nullify Sections 9-201, 16-108(b), 16-108(a), and 16-111(a)(3). That is not reasonable. Indeed, under Movants' "logic", any change to an approved delivery services tariff other than a rate reduction -- i.e., any other modification of any kind -- would be barred by Section 16-111(f).

The Movants, near the end of their discussion of Section 16-111, also throw in the one sentence argument that: "By requesting the Commission to make decisions in the instant proceeding that would impact all delivery services customers as well as the base rates and policies that the Commission could adopt in a future proceeding, Edison improperly and illegally is attempting to circumvent this prohibition." ("Motion to Strike", page 7). The Movants' assertion as to delivery services customers has been refuted above. This case obviously involves no increase in the price of any service under any base rate.

Finally, the Movants, in the middle of their discussion of Section 16-111, make the side-argument that ComEd's Petition should be dismissed on the theory that it "is deficient in failing to properly allege that the Commission has jurisdiction and should be dismissed on those grounds alone." ("Motion to Strike", page 3). To begin with, ComEd's Petition expressly stated that it is brought under the Act. Thus, the Movants' premise is false. The Movants, not surprisingly, offer no argument and no relevant citation that ComEd was required to cite each specific Section or sub-section of the Act under which the Petition was brought. The sole citation they do provide ("Motion to Strike", page 3 (citing *Private Tele-Communications, Inc. v. Illinois Bell Telephone Co.*, 31 Ill. App. 3d 887, 890, 335 N. E. 2d 110, 113 (1st Dist. 1975))), relates to allegations required in an Illinois State court pleading, and even then that case does not hold or imply that if the facts stated in a pleading establish jurisdiction in the court, the pleading nonetheless is deficient if it fails to expressly cite a specific statutory Section or sub-section vesting jurisdiction in the court. The facts stated in ComEd's Petition obviously show that the Commission has jurisdiction over this proceeding. Also, if Movants' theory were right, then their second sub-motion, that the Commission must immediately approve and place into effect ComEd's proposed Rider HVDS, obviously would be wrong, because the Commission would not have ComEd's Petition before it and the Commission would have no jurisdiction.

The "Motion to Strike" goes on to make the parallel arguments that: "Edison's petition in the instant proceeding fails to identify any authority for electric utilities such as Edison to file revised delivery services tariffs which would **increase** the rates to delivery services customers once those tariffs have been approved by the Commission. Likewise, Edison's petition fails to identify any authority for it to relitigate the issue of the methodology used to establish the MSP credit." ("Motion to Strike", page 6). The erroneous nature of these points is shown above.

Moreover, here Movants have pitched their rhetoric so far as effectively to be arguing that ComEd's Petition also had to be a legal brief. There is no rule or reason that supports Movants.

III. Nothing In Section 10-113 Of The Act Bars ComEd From Requesting, Or Denies The Commission The Authority To Order, Increases In Non-residential Delivery Services Charges And Revisions In The Methodology For Calculating Unbundled Metering Service Charges

The Movants also attack ComEd's proposals regarding non-residential delivery services charges, including its request to revise the methodology for calculation of unbundled metering services charges, based on the argument that Section 10-113 of the Act, 220 ILCS 5/10-113, bars ComEd from making these proposals and bars the Commission from approving them. Once more, the Movants' position is groundless.

Section 10-113 on its face and as it has been interpreted simply constitutes no such prohibition. In *Illinois Bell Telephone v. Illinois Commerce Commission*, 414 Ill. 275, 111 N.E.2d 329 (1953) the Illinois Supreme Court addressed the exact argument put forth by the Movants in the instant proceeding. The City of Chicago contended that the Commission should have cancelled rate schedules which Illinois Bell Telephone had filed with the Commission for approval. The City's argument (in relation to a prior codification of the Act) was almost identical to the Movants', argument in the instant proceeding.

> [T]he Commission should have cancelled an annulled the rate schedules filed with it, for the reason that less than two years had elapsed since the last order had been entered by the Commission on the rate schedules filed by the Company, in violation of Section 67 of the Public Utilities Act.

Id at 278, 111 NE.2d at 331. In *Illinois Bell*, the Illinois Supreme Court held (in relation to the prior codification), that the statutory construction of the final sentence in Section 10-113(a), which was put forth by the City of Chicago and is what is relied on by the Movants here is "in

direct conflict with the act" and is not intended to prohibit the Commission's consideration of distinct issues, also considered in prior proceedings, for a period of two years. *Id* at 281, 111 N.E.2d at 333.

> A thorough reading of the act, particularly sections 36 and 71, makes it clear that the isolated sentence is in conflict with the proposition that a two-year period must elapse. If the legislature intended the last sentence of section 67 to be an absolute two-year limitation, then it probably would have placed it in section 36 of the act, and would not have tacked it on to an entirely distinct section. We are of the opinion that the last sentence of section 67 does not constitute a limitation of two years.

Id at 281, 111 N.E.2d at 333. As best ComEd can determine, no Commission Order and no court decision ever has interpreted that provision of Section 10-113 to preclude a utility from filing, or the Commission from determining, a rate case.

IV. The "Motion to Strike" Is Flatly Contradicted By Positions Taken By Three Of The Movants In Docket Nos. 99-0013, And It Is Irreconcilable With The Commission's Orders In Docket Nos. 99-0013 And 00-0494

The "Motion to Strike", as to the first sub-motion, as discussed above, argues that the Act does not authorize, and instead bars, ComEd from requesting, and the Commission from approving, increases in ComEd's non-residential delivery services charges during the remainder of the transition period provided for in the restructuring legislation. That argument is belied expressly by multiple briefs filed by three of the Movants in Commission Docket No. 99-0013.

In Commission Docket No. 99-0013, an "Unbundling Coalition" included three of the six parties that are the Movants here: Blackhawk Energy Services, L.L.C., Enron Energy Services, Inc., and AES NewEnergy, Inc. (then known as NewEnergy Midwest, L.L.C.). In that Docket, the Unbundling Coalition, in its Initial Brief filed on July 14, 2000, represented by the same counsel who represent the some of the Movants in this proceeding, stated in part as follows on page 15 of that brief:

> As the Commission is aware, the utilities will have additional proceedings in which they will be able to address alleged implementation costs in the proper context. In fact, the utilities are required to file a residential delivery services rate proceeding no later than August 1, 2001. *(See* Weiss Tr. at 1341.) **Of course, as the utilities were forced to admit, any utility may petition the Commission at any time for an increase in its non-residential delivery services rates.** *(See* Houtsma Tr. at 1620; Weiss Tr. at 1341.) Furthermore, at the end of the transition period, the utilities may petition the Commission for a general rate increase. *(See* 220 ILCS 5/16-111(a).) **In any such proceeding, the utilities could, and likely would, present evidence that their overall revenue requirements have changed.** The costs associated with meter service unbundling would be a single issue appropriately addressed within such a proceeding.

(Emphasis added). Moreover, in that Docket, the Unbundling Coalition, in its Brief on Exceptions filed on August 23, 2000, represented by the same counsel who represent some of the Movants in this proceeding, included that same paragraph, word for word, on pages 12-13 of that brief. Further, in that Docket, the Unbundling Coalition, in its Reply Brief on Exceptions filed on August 30, 2000, represented by the same counsel who represent some of the Movants in this proceeding, again included that same paragraph, word for word, on page 10 of that brief.

In Docket No. 99-0013, the Commission's Staff ("Staff"), too, agreed that utilities may at any time seek an increase in their delivery services charges. For example, Staff, in its Initial Brief filed on July 14, 2000, stated in part on page 8 of that brief as follows:

> **As various utility witnesses acknowledged, utilities may file new DST rate cases at any time**. (Tr. 1480 (Mortland), 1620 (Houtsma)) **If utilities believe that their rates are inadequate, they can file to open appropriate dockets where all the costs and benefits to the companies and their customers can be fully explored**.

(Emphasis added).

In Docket No. 99-0013, ComEd did not take a contrary position. In fact, as the Unbundling Coalition's and Staff's briefs as quoted above indicated, ComEd and other utilities agreed in that Docket that at any time they could seek an increase in their delivery services charges. Thus, unlike the three members of the Unbundling Coalition who are among the Movants here, ComEd took the same position in that Docket that it is taking in this proceeding.

The Commission's Order in Docket No. 99-0013 also cannot be reconciled with the position now taken by the Movants. To begin with, the Order did not hold or imply that ComEd and other utilities could not at any time seek an increase in their delivery services charges. To the contrary, the Order held that it was appropriate in that Docket to approve ComEd's and the other utilities requests to establish new or different delivery service rates that would allow them to recover costs of implementing unbundled metering service that "are not recovered in existing DST rates." *Illinois Commerce Commission On Its Own Motion v. Central Illinois Light Co., et al.*, Docket No. 99-0013, page 11 (Order October 4, 2000). As was noted earlier, if the Movants' arguments were correct, then the Commission's Order in that Docket was beyond the Commission's jurisdiction and illegal.

The Commission's Order in Docket No. 00-0494 also cannot be reconciled with the positions now taken by the Movants. The Order stated, among other things, that: "**The Commission unmistakably has the authority to direct changes to a utility's delivery services tariffs** and along with that authority is the right to mandate uniform language provisions and/or a *pro forma* tariff." *Illinois Commerce Commission On Its Own Motion v. Central Illinois Light Co., et al.*, Docket No. 00-0494, page 9 (Order, March 21, 2001). The "Motion to Strike", as to the first sub-motion, plainly is belied by three of Movants' positions in Docket Nos. 99-0013, and cannot be reconciled with the Commission's Orders in Docket Nos. 99-0013 and 00-0494.

V. Nothing In Sections 9-241, 9-250, 16-101A, And 16-112 Of The Act Bars The Commission From Approving Just And Reasonable Cost Based Delivery Services Rates That Allow ComEd To Recover Costs Of Providing Delivery Services

The Movants request that the Commission strike ComEd's proposals relating to non-residential delivery services charges, including unbundled metering service charges, as

"unjust, unlawful and unreasonable", "unfairly discriminatory", and "anti-competitive" under Section 9-241, 9-250, 16-101A, and 16-112 of the Act, 220 ILCS 5/9-241, 9-250, 16-101A, and 16-112, and based on "policy reasons". ("Motion to Strike", pages 9-11). In other words, the Movants request that the Commission prejudge the outcome of a host of issues (or supposed issues) in this proceeding without permitting ComEd (and the other parties) even to complete the submission of pre-filed written testimony, much less affording ComEd (or the other parties) an evidentiary hearing and the opportunity to conduct cross-examination.

Were the Commission to do as the Movants request, then the Commission would violate essentially every fundamental procedural principle (and quite a few fundamental substantive principles) applicable to Commission proceedings under the United States and Illinois Constitutions, under the Act, and under the Commission's Rules of Practice.

In a contested rate case such as this proceeding, ComEd has the right to due process and to notice and an opportunity to be heard on its proposed rates and riders, including, among other things, the right to submit evidence and to conduct cross-examination. *E.g.*, U.S. Const. amend. IX; Ill. Const., art. I., § 2; *Balmoral Racing Club, Inc. v. Illinois Racing Board*, 151 Ill. 2d 367, 401, 603 N.E.2d 489, 502 (1992); *Quantum Pipeline Co. v. Illinois Commerce Comm'n*, 304 Ill. App. 3d 310, 320, 709 N.E.2d 950, 956 (3d Dist.), *appeal denied*, 185 Ill. 2d 665, 720 N.E.2d 1105 (1999); 5 ILCS 100/10-40(b); 83 Ill. Admin. Code § 200.20, 200.625, 200.640(c). "Notice is a fundamental requirement of due process.... Equally as fundamental is the opportunity to be heard at a meaningful time and in a meaningful manner." *Quantum*, 304 Ill. App. 3d at 320, 709 N.E.2d at 956. Of course, a Commission order that is the result of procedures that are contrary to law is reversible error. 220 ILCS 5/10-201(e)(iv)(D); *Citizens Utility Board v. Illinois Commerce Comm'n*, 166 Ill. 2d 111, 120-21, 651 N.E.2d 1089,1094-95

(1995); *Business and Prof'l People for the Pub. Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 204, 240, 555 N.E.2d 693, 698, 715 (1989) ("BPI").

The Movants' disdain for the law also is reflected in their repeated selective citation and characterization of the legislative findings of the restructuring legislation here and in their testimony, attempting to convince the Commission that such findings vest the Commission with jurisdiction or authority and impose requirements on the Commission. ("Motion to Strike", pages 9, 10). The Movants do not fairly and completely characterize the legislative findings, and, even more importantly, they disregard the well-established law under which the findings do not vest the Commission with jurisdiction or authority and do not impose mandates or other requirements on the Commission.

The Commission only has those powers given it by the General Assembly through the Act, and no requirement to be imposed on public utilities can be read into the Act by intendment or implication. *BPI*, 136 Ill. 2d at 201, 555 N.E.2d at 697 (1989); *Turgeon v. Commonwealth Edison Co.*, 258 Ill. App. 3d 234, 251, 630 N.E.2d 1318, 1330 (2d Dist.), *appeal denied*, 157 Ill. 2d 524, 642 N.E.2d 1305 (1994)). There can be no dispute that the legislative intent and finding provisions do not expand the jurisdiction or authority of the Commission or otherwise function as operative provisions of the Act. *E.g., Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111, 126, 651 N.E.2d 1089, 1097 (1995) ("The function of a statutory preamble is to supply reasons and explanations for the legislative enactments.").

The Movants also conveniently overlook those legislative findings that do not suit them. For example, the General Assembly found, in Section 16-101A(c) of the Act, 220 ILCS 5/16-101A(c), that:

> With the advent of increasing competition in this industry, the State has a continued interest in assuring that the safety, reliability, and affordability of

> electrical power is not sacrificed to competitive pressures, and to that end, intends to implement safeguards to assure that the industry continues to operate the electrical system in a manner that will serve the public's interest. Under the existing regulatory framework, the industry has been encouraged to undertake certain investments in its physical plant and personnel to enhance its efficient operation, the cost of which it has been permitted to pass on to consumers. The State has an interest in providing the existing utilities a reasonable opportunity to obtain a return on certain investments on which they depend in undertaking those commitments in the first instance while, at the same time, not permitting new entrants into the industry to take unreasonable advantage of the investments made by the formerly regulated industry.

220 ILCS 5/16-101A(c).

Moreover, while the Movants quote ("Motion to Strike", page 10) an excerpt from Section 16-101A(d) of the Act, 220 ILCS 5/16-101A(d), they fail to take into account that even that excerpt expressly supports, among other things, development of a retail electricity market "**that operates efficiently**…." (Emphasis added). As ComEd has shown in its testimony filed to date, and will show in the remaining development of the evidentiary record, ComEd's proposals are essential in order for the retail electric market to operate efficiently within the strictures of the operative provisions of the Act and the applicable constitutional principles.

The Movants would read the legislative findings of the Act without regard for its actual operative provisions when that suits their interests. For example, as noted earlier, one of the actual operative provisions of the Act, Section 16-108(c), 220 ILCS 5/16-108(c), entitles ComEd to fully recover its costs of providing delivery services and to "cost based" rates. Yet, the Movants would have the Commission rely on the legislative findings -- as well as "policy reasons" not based on any statutory provision -- as a basis for violating those provisions of Section 16-108(c).

The Movants complain that delivery services rates are subject to modification while bundled services rates are "frozen." ("Motion to Strike", page 9). That is nonsense. The General Assembly that "froze" bundled rates as provided in detail in Section 16-111 of the Act

also is the same General Assembly that expressly confirmed in Section 16-111 and in Section 16-108(b) and 16-108(a) that the Commission has the authority to modify delivery services rates, as shown earlier. The Movants' complaint in reality is a complaint about the Act, not about ComEd's proposals.

Given the above, the Movants' argument ("Motion to Strike", page 9) that ComEd's proposal violates anti-discrimination provisions of the Act, 220 ILCS 5/9-241, 9-250, is exposed as lacking any merit. The alleged "discrimination" about which the Movants complain inheres in the rate design established by the General Assembly. Moreover, the Movants' complaint also overlooks that delivery services customers have a choice about whether to become or to remain delivery services customers. 220 ILCS 5/16-103.

The Movants' complaint that delivery services customers "would be subject to fluctuating delivery services rates" ("Motion to Strike", page 9), not only rings hollow, it is contrary to the very excerpt from the legislative findings that the Movants do quote, which, as noted above, encourages, among other things, an efficient retail electricity market. 220 ILCS 5/16-101A(d). The same is true of the Movants' similar assertion that: "To promote competition, it is necessary that the Commission prevent Edison from adding increased uncertainty to the marketplace." ("Motion to Strike", page 10).

Further, the Movants' suggestion that ComEd will file a delivery services rate case just so as to create uncertainty about delivery services charges ("Motion to Strike", pages 9, 10) is ridiculous. A case such as this rate case obviously imposes immense burdens on ComEd and its personnel, and very significant costs. (ComEd Exhibit 4.0, Appendix C, Schedule B-2.3). ComEd's witnesses testify why this case was filed. (*E.g.*, ComEd Exhibit 1.0, lines 61-149). That is why it was filed.

Finally, the Movants' argument that ComEd should not be allowed to seek any increased delivery services charges until 2005 ("Motion to Strike", page 11) is the height of recklessness. A provider of reasonably safe and reliable delivery services is essential to open access and, even more fundamentally, to the public interest, as is suggested by more than one of the legislative findings that the Movants ignore. *See* 220 ILCS 5/16-101A(a), (c), (d). To starve the provider of delivery services -- here ComEd -- by imposing an illegal five year delivery services rate freeze based on a Commission Docket that used a 1997 adjusted test year (Docket No. 99-0117), in the face of the demonstrated and undisputed efforts that ComEd has made to maintain and improve the reliability of its distribution system, would be the height of unlawfulness and imprudence and profoundly unfair.

VI. The Commission Is Not Authorized, Much Less Required, To Make Rider HVDS Effective Immediately

ComEd in its Petition filed on June 1, 2001, requested approval of, among other things, a new rider, Rider HVDS, to be effective May 1, 2002. ComEd did not file Rider HVDS. Rather, ComEd only attached proposed Rider HVDS to the Petition. ComEd, in doing so, complied with the request of Staff that ComEd file with the Commission a Petition rather than file tariff sheets that the Commission would be required to suspend pending hearing.

The Movants argue -- in a two sentence argument -- that Section 16-111(f) of the Act requires that the Commission place Rider HVDS into effect immediately. ("Motion to Strike", page 8). Their argument is wrong, for several obvious reasons.

Section 16-111(f) provides as follows:

> During the mandatory transition period, an electric utility may file revised tariffs reducing the price of any tariffed service offered by the electric utility for all customers taking that tariffed service, which shall be effective 7 days after filing.

Section 16-111(f) does not apply here because ComEd did not file a tariff reducing the price of any service, it simply attached proposed Rider HVDS to the Petition. That is a very real distinction of serious consequence, as is reflected in the fact that Staff requested that ComEd proceed in one manner and not in the other.

Section 16-111(f) also does not apply here because proposed Rider HVDS provides for a new credit -- not a new charge or a reduced charge -- for which only delivery services customers taking service at 69,000 kV or higher are eligible. Proposed Rider HVDS obviously does not "reduc[e] the price of any tariffed service offered by the electric utility for all customers taking that tariffed service…." There is not even one delivery services customer class in which all customers are eligible for proposed Rider HVDS. The Movants' request regarding proposed Rider HVDS is transparent flummery.

Finally, proposed Rider HVDS is not a stand-alone rate that was proposed or designed to be separately effective. Nor does its design reduce rates. As is clear from the rate and the testimony, proposed Rider HVDS redistributes class revenue requirements on a revenue neutral basis in a manner that ComEd believes is more in line with actual cost causation. ComEd witnesses Sally Clair and Paul Crumrine testify:

> Rider HVDS provides a mechanism that appropriately reflects the cost of service to high voltage delivery services customers. As a result, the stated Distribution Facilities Charge in Rate RCDS, before application of the credit, for the larger customer classes is higher than before because of the removal of these cost savings from the class averages. However, for those delivery services customers that are served under the combination of Rate RCDS and Rider HVDS, the net cost to these customers will go down as a result of this modification. This is appropriate because it more accurately assigns the costs of service to defined classes.

(ComEd Exhibit 12.0, lines 749-755). Nothing in Section 16-111(f) authorized, let alone requires, the Commission to pick out those rate design elements from an integrated filing that,

from the perspective of some customers, reduce their charges and plan involuntarily implement that part of the proposal alone.

CONCLUSION

For the foregoing reasons, ComEd respectfully requests that the "Motion to Strike" be denied.

Dated: September 28, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John P. Ratnaswamy, do hereby certify that a copy of the foregoing Commonwealth Edison Company's Response To the "Joint Motion To Strike" was served upon all parties on the attached Service List by 4:00 p.m. this 28 day of September, 2001.

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